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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Carribean<sup>1</sup> Ice Cream Co., Ltd.

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Serial No. 78256650

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Scott R. Austin of McDonald Hopkins Co., LPA for Carribean Ice Cream Co., Ltd.

Carol Spils, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Quinn, Hairston and Bucher, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Carribean Ice Cream Co., Ltd. (a Canadian corporation) to register the mark TROPICAL TREETS for "ice cream, ice cream drinks, frozen yogurt, kulfi, sorbet" in class 30 and "aerated fruit juices, fruit juices, fruit drinks, fruit flavored soft

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<sup>1</sup> We note that applicant's name is spelled "Carribean" rather than "Caribbean."

drinks, fruit-flavored drinks, concentrates, syrups or powders used in the preparation of soft drinks" in class 32.<sup>2</sup>

The trademark examining attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark is merely descriptive of the identified goods.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs. An oral hearing was not requested.

The examining attorney contends that the mark TROPICAL TREETS describes a feature or characteristic of applicant's goods. The examining attorney maintains that the word TROPICAL describes the flavor of applicant's goods. In this regard, the examining attorney points to applicant's statement in its supplemental brief at p. 12 that "[a]pplicant's ice creams and juices ... are specifically manufactured to utilize and infuse the flavor of a tropical plant fruit, such as mango or papaya, in its products." Also, the examining attorney notes that applicant has disclaimed the word TROPICAL. Further, the examining

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<sup>2</sup> Application Serial No. 78256650, filed June 1, 2003. The application is based on use in commerce, and January 1, 1984 is alleged to be the date of first use anywhere and the date of first use in commerce as to the goods in both classes. Applicant

attorney contends that the term TREETTS is an alternative spelling of the word "treats" which is equally descriptive of applicant's goods.

In support of the refusal to register, the examining attorney submitted excerpts from the NEXIS data base which refer to "tropical treat," including the following:

Chile's soft fruit season is basically over, but console yourself with tropical treats such as pineapples and papaya. (The Dallas Morning Star, April 17, 1996);

Dishes become tropical treats when coconut is in the recipe. (The Miami Herald, May 3, 2001);

With its sweet, exotic flavor, coconut can turn a typical dish into a tropical treat. (The San Luis Obispo Tribune, May 9, 2001); and

For dessert, mango with sweet rice (\$3.95) is a filling tropical treat. (Omaha World Herald, March 1, 2002).

Additionally, the examining attorney submitted excerpts from the NEXIS data base which refer to "ice cream treat;" "yogurt treat;" "sorbet treat;" "non-alcoholic treat;" or "beverage treat," including the following:

For a special non-alcoholic treat, there is a daily homemade sweet drink such as rice milk or freshly squeezed pineapple juice. (Plain Dealer, August 16, 1996);

As a special treat, Hamill had her wait staff pass tiny, fruit-shaped ice cream and sorbet treats made by the St. Clair Ice Cream Co. of

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has voluntarily disclaimed the word TROPICAL apart from the mark as shown.

South Norwalk, Connecticut. (The Advocate, November 13, 1997);

The stand has been a fixture in Greenwood for more than 50 years. It offers ice cream treats and snacks, including shakes, sundaes and coney dogs. (The Indianapolis Star, August 1, 2005);

...Cream of Weber Diary has created a special collection of recipes with favorite entrees, desserts and beverage treats. (The Washington Post, September 28, 1999); and

Delightfully cold yet tasty ice cream and frozen yogurt treats are a nice addition to summer's overwhelmingly steamy temperatures. (Charleston Gazette, July 3, 2002).

Finally, the examining attorney submitted third-party registrations for "TREAT" marks, e.g., TRICK OREO TREAT for ice cream; TCBY TREATS for ice cream and yogurt; POLAR TREATS and design for ice cream; and TWISTEE TREAT for ice cream, in order to show that the USPTO has considered "treat" as a descriptive term for such goods. Thus, the examining attorney argues that the combined term TROPICAL TREETS is merely descriptive of applicant's goods.

Applicant, in urging reversal of the refusal to register, argues that its mark is at most suggestive of the goods. Applicant points out that none of the NEXIS excerpts relied on by the examining attorney shows use of "tropical treat" in connection with applicant's types of goods. Thus, applicant argues that there is no evidence of

record of descriptive use of "tropical treat" for ice cream and non-alcoholic beverage products. According to applicant,

... for ice cream, TROPICAL TREETTS is not descriptive; and without Applicant's advertising to narrow consumer focus, "Tropical Treetts" may conjure up in the mind of the consumer many products other than Applicant's ice cream. Applicant's mark as a whole is not descriptive of Applicant's beverage products. Although "tropical" might be considered descriptive of a flavor of a beverage, "tropical treats" identifies, as the Examining Attorney's evidence shows, many drinks more exotic than mere fruit juice or soft drinks. As such, applicant contends that Applicant's mark taken as a whole is suggestive, not merely descriptive. (citations omitted). (Applicant's brief at p. 6).

Applicant submitted third-party registrations for TREAT marks, e.g., KIWI ISLAND TREAT for non-alcoholic frozen treats; CREAMY TREAT for ice cream; FROSTED TREAT for frozen desserts; and EVERYBODY DESERVES A TREAT for ice cream, in which the term "treat" has not been disclaimed. Applicant argues that, at a minimum, these registrations are enough to raise doubt as to whether applicant's mark is merely descriptive.

A term is merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use

of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215. A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365 (TTAB 1985).

Applying these principles to applicant's mark, we find that TROPICAL TREETS is merely descriptive of applicant's goods. The mark directly and immediately informs prospective purchasers that applicant's goods are "tropical fruit flavored treats." There is no question that the

disclaimed term TROPICAL describes a characteristic or feature of applicant's goods. Applicant has acknowledged that its ice creams and juices are infused with tropical fruit flavors. In fact, pictured in applicant's specimen are containers of mango ice cream and coconut ice cream.

Further, the evidence made of record by the examining attorney shows that applicant's types of goods are referred to as "treats." The word "treats" has descriptive significance with respect to applicant's goods in that it describes their nature. As the examining attorney notes, and applicant does not disagree therewith, TREETS is simply a variation of the word "treats." Prospective purchasers would recognize "treets" as simply a slight misspelling of the word "treats." A slight misspelling does not change a merely descriptive term into a suggestive term. See *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505 n. 9 (CCPA 1980) [QUIK-PRINT held merely descriptive; "There is no legally significant difference here between 'quik' and 'quick'").

Here, the combination of the two terms TROPICAL and TREETS does not result in any different significance. Rather, the combination simply conveys the merely descriptive meanings of its parts. See *In re Bright-Crest, Ltd.*, supra [The term COASTER-CARDS found merely

descriptive of coasters suitable for direct mailing] and In re Tower Tech, Inc., 64 USPQ2d 1314 (TTAB 2000) [SMARTTOWER found merely descriptive of commercial and industrial cooling towers].

Insofar as the registrations for TREAT marks for which disclaimers were not required, we do not know the circumstances under which those registration issued. Moreover, even if applicant can point to other registrations that have "some characteristics similar to [this] application, the PTO's allowance of such prior registrations does not bind the Board or this court." See In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

In sum, we find that the mark TROPICAL TREETS is merely descriptive of applicant's "ice cream, ice cream drinks, frozen yogurt, kulfi, sorbet" and "aerated fruit juices, fruit juices, fruit drinks, fruit flavored soft drinks, fruit-flavored drinks, concentrates, syrups or powders used in the preparation of soft drinks." The fact that applicant may be the first and/or only user of the term for its involved goods does not justify registration of the term where, as here, the term projects a merely descriptive significance. In re National Shooting Sports Foundation, Inc., 219 USPQ 1018 (TTAB 1983).



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**Decision:** The refusal to register under Section 2(e)(1) is affirmed.